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General Services Administration
Office of Acquisition Policy
Washington, DC 20405



ER 89-1219/1

July 20, 1989

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER NO. 89-6

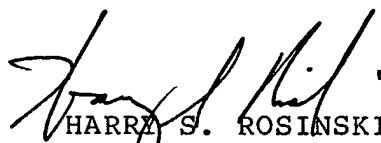
TO: Civilian Agencies Other than NASA

SUBJECT: Federal Acquisition Circular (FAC) 84-50, Liquidated Damages

This CAAC Letter provides a copy of the FAR revisions being issued under FAC 84-50 for your immediate use. The FAC was published in the Federal Register as an interim rule on July 21, 1989. A copy of the FAR coverage is attached.

FAC 84-50 implements section 304 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656), which, among other things, requires a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals.

The FAC includes a new clause, Liquidated Damages (FAR 52.219-16) which must be included in all contracts awarded on or after August 15, 1989. Distribution of this CAAC Letter in advance of the loose-leaf FAR coverage is necessary to provide contracting officers sufficient time to amend solicitations to include the clause.


HARRY S. ROSINSKI
Acting Chairman
Civilian Agency
Acquisition Council

Enclosure

Federal Acquisition Circular (FAC) 84-50 amends the Federal Acquisition Regulation (FAR) as specified below:

ITEM—LIQUIDATED DAMAGES

FAR 19.701, 19.702, 19.705-4, 19.705-6, 19.706, 19.708 are revised and 19.705-7 and the clause at 52.219-16 are added to implement section 304 of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) which, among other things, requires a prime contractor to pay liquidated damages upon a finding of lack of good faith effort to meet its small business subcontracting goals. The contracting officer's final decision is expressly made subject to the Contract Disputes Act.

Liquidated damages will be assessed at the actual dollar amount by which the contractor failed to achieve each subcontract goal. Such damages may be in addition to any other remedies the Government may have under the contract.

These changes apply to contracts awarded on or after August 15, 1989.

Therefore, 48 CFR Parts 19 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 19 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

2. Section 19.701 is amended by alphabetically adding the definition "Failure to make a good faith effort to comply with the subcontracting plan," to read as follows:

19.701 Definitions.

"Failure to make a good faith effort to comply with the subcontracting plan," as used in this subpart, means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

* * * * *

3. Section 19.702 is amended by revising paragraph (c) to read as follows:

19.702 Statutory requirements.

* * * * *

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

4. Section 19.705-4 is amended by revising paragraph (c); by redesignating existing paragraphs (d)(2), (3), (4), and (5) as (d)(3), (4), (5), and (6); and by adding a new (d)(2) to read as follows:

19.705-4 Reviewing the subcontracting plan.

* * * * *

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the six elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small and small disadvantaged subcontractors to the maximum practicable extent. Particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns) may be used when additional and unique contractor effort could significantly increase subcontract awards to small or small disadvantaged businesses.

(d) * * *

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that

the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

* * * * *

5. Section 19.705-6 is amended by adding paragraph (f) to read as follows:

19.705-6 Postaward responsibilities of the contracting officer.

* * * * *

(f) Initiating action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

6. Section 19.705-7 is added to read as follows:

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small and small disadvantaged business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontract goal or, in the case of a commercial products plan, shall be that portion of the dollar amount allocable to Government contracts by which the contractor failed to achieve each subcontract goal.

(c) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals and the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 10 days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business and small disadvantaged business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following may be considered as indicia of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award, small business or small disadvantaged business concerns; a failure to designate a company official to administer the subcontracting program; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small Business and Small Disadvantaged Business Subcontracting Plan, the contracting officer of the agency that originally approved the plan will exercise the functions of the contracting officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

7. Section 19.706 is amended by removing at the end of paragraph (a)(4) the word "and"; by removing at the end of paragraph (a)(5) the period and inserting in its place "; and"; and by adding paragraph (a)(6) to read as follows:

19.706 Responsibilities of the cognizant administrative contracting officer.

* * * * *

(a) * * *

(6) Immediate notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan.

* * * * *

8. Section 19.708 is amended by redesignating existing paragraph (b) as new (b)(1); by redesignating existing (b)(1), (2), and (3) as (b)(1)(i), (ii), and (iii); and by adding a new paragraph (b)(2) to read as follows:

19.708 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(2) The contracting officer shall insert the clause at 52.219-16, Liquidated Damages—Small Business Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, or its Alternate I.

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PART 52—SOLICITATIONS PROVISIONS AND CONTRACT CLAUSES

9. Section 52.219-16 is added to read as follows:

52.219-16 Liquidated Damages—Small Business Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES—SMALL BUSINESS SUBCONTRACTING PLAN (AUG 1989)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business and Small Disadvantaged Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in

this contract entitled Small and Small Disadvantaged Business Subcontracting Plans, the Contractor shall pay the Government liquidated damages in an amount stated. The amount of damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract entitled, Small Business and Small Disadvantaged Business Subcontracting Plan, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.
(End of clause)